

<sup>2</sup> The Board notes that, following the August 6, 2018 decision, OWCP received additional evidence. However, the Board’s *Rules of Procedure* provides: “The Board’s review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.” 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **ISSUES**

The issues are: (1) whether appellant received a \$1,000.93 overpayment of wage-loss compensation for the period April 6 through 28, 2018, for which she was without fault; and (2) whether OWCP properly denied waiver of recovery of the overpayment.

## **FACTUAL HISTORY**

On July 22, 2017 appellant, then a 52-year-old mail handler assistant, filed a traumatic injury claim (Form CA-1) alleging that on that date she strained her right shoulder while in the performance of duty. She stopped work on July 22, 2017. OWCP accepted the claim for a strain of unspecified muscles, fascia, and tendons at the right shoulder and upper arm level. It subsequently expanded acceptance of the claim to include a complete rotator cuff tear or rupture of the right shoulder.

On January 4, 2018 appellant underwent a right shoulder rotator cuff repair and open biceps tenodesis. OWCP paid her wage-loss compensation on the supplemental rolls for the period January 6 through February 3, 2018 and on the periodic rolls for the period February 4 through April 28, 2018. It paid appellant \$1,218.52 in wage-loss compensation for the period April 1 to 28, 2018.

On January 23, 2018 appellant filed a claim for compensation (Form CA-7). On the form the employing establishment confirmed that her work schedule guaranteed her 35.70 hours of work per week.

On April 17, 2018 appellant accepted a position as a modified mail handler assistant effective April 4, 2018 working 35.70 hours per week at the same level and step as her date-of-injury position. In an April 26, 2018 e-mail, the employing establishment advised that she had returned to work on April 6, 2018.

In a preliminary overpayment determination dated May 18, 2018, OWCP notified appellant that she had received an overpayment of compensation in the amount of \$1,000.93 because she returned to employment with no wage loss on April 6, 2018, but received wage-loss compensation for total disability through April 28, 2018. It further advised her of its preliminary determination that she was without fault in the creation of the overpayment. OWCP requested that appellant complete the enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation. It notified her that failure to submit the requested information within 30 days would result in the denial of waiver of recovery of the overpayment. Additionally, OWCP notified appellant that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence, or a precoupment hearing.

Appellant did not respond to the preliminary overpayment determination within the time allotted.

By decision dated August 6, 2018, OWCP found that appellant had received a \$1,000.93 overpayment of compensation as it had paid her wage-loss compensation for total disability for

the period April 6 through 28, 2018 after she returned to work with no wage loss. It determined that she was without fault in the creation of the overpayment of compensation, but denied waiver of recovery of the overpayment, noting that she had not responded to its preliminary overpayment determination or provided evidence regarding her financial situation. OWCP found that appellant should submit \$200.00 monthly to repay the overpayment of compensation.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102 of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.<sup>3</sup>

Section 8116 of FECA defines the limitations on the right to receive compensation benefits. This section of FECA provides that, while an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States, except in limited specified instances.<sup>4</sup> OWCP's regulations provide that compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.<sup>5</sup> A claimant is not entitled to receive temporary total disability benefits and actual earnings for the same time period.<sup>6</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant received a \$1,000.93 overpayment of wage-loss compensation for the period April 6 through 28, 2018, for which she was without fault.

Appellant returned to a modified position with no wage loss on April 6, 2018. She worked 35.70 hours per week, the amount of time guaranteed by the employing establishment for her date-of-injury position. She continued to receive wage-loss compensation for total disability on the periodic rolls through April 28, 2018.

As noted above, a claimant is not entitled to receive compensation for total disability during a period in which he or she had actual earnings.<sup>7</sup> Therefore, an overpayment of compensation was created in this case.<sup>8</sup>

Appellant received disability compensation in the net amount of \$1,218.52 for the period April 1 through 28, 2018. She was only entitled to wage-loss compensation of \$217.59. Thus, the

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<sup>3</sup> 5 U.S.C. § 8102.

<sup>4</sup> *Id.* at § 8116(a).

<sup>5</sup> 20 C.F.R. § 10.500(a).

<sup>6</sup> *P.S.*, Docket No. 18-1438 (issued February 1, 2019).

<sup>7</sup> *L.W.*, Docket No. 17-0356 (issued June 22, 2017).

<sup>8</sup> *See K.E.*, Docket No. 18-0687 (issued October 25, 2018).

Board finds that appellant received an overpayment of compensation in the amount of \$1,000.93 during the period April 6 through 28, 2018.<sup>9</sup>

On appeal, appellant contends that after her injury she could only work 35 hours per week modified employment and that prior to this time she worked over 40 hours per week. The employing establishment, however, specified that her mail handler assistant position guaranteed her 35.70 hours per week. As appellant continued to receive wage-loss compensation for total disability on the periodic rolls through April 28, 2018, an overpayment of compensation was created.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129 of FECA provides that an overpayment must be recovered unless “incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of [FECA] or would be against equity and good conscience.”<sup>10</sup>

Section 10.438 of OWCP regulations provides that the individual who received the overpayment is responsible for providing information about income, expenses, and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. Failure to submit the requested information within 30 days of the request shall result in denial of waiver.<sup>11</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP properly denied waiver of recovery of the \$1,000.93 overpayment of compensation.

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.<sup>12</sup> Appellant, however, had the responsibility to provide the appropriate financial information to OWCP.<sup>13</sup>

In its preliminary overpayment determination dated May 18, 2018, OWCP requested that appellant provide a completed overpayment recovery questionnaire and supporting financial information. It advised her that waiver of recovery of the overpayment would be denied if she failed to furnish the requested financial information within 30 days.

Appellant did not respond to the preliminary determination before OWCP issued its August 6, 2018 overpayment determination. As a result, OWCP did not have the necessary

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<sup>9</sup> *Id.*

<sup>10</sup> 5 U.S.C. § 8129(a)-(b); *see D.C.*, Docket No. 17-0559 (issued June 21, 2018).

<sup>11</sup> 20 C.F.R. § 10.438.

<sup>12</sup> *Id.*; *see also O.B.*, Docket No. 19-0034 (issued April 22, 2019).

<sup>13</sup> *Id.*; *see also S.M.*, Docket No. 17-1802 (issued August 20, 2018).

financial information to determine whether recovery of the overpayment would defeat the purpose of FECA or if recovery would be against equity and good conscience. Because appellant failed to submit the requested information within 30 days, it had no discretion in the matter. The law therefore required a denial of waiver.<sup>14</sup>

Consequently, as appellant did not submit the financial information required under section 10.438 of OWCP's regulations, which was necessary to determine her eligibility for waiver, the Board finds that OWCP properly denied waiver of recovery of the overpayment of compensation in the amount of \$1,000.93.<sup>15</sup>

On appeal, appellant contends that she was without fault in creating the overpayment of compensation. However, the fact that she was not at fault does not relieve her from liability for repayment of the overpayment of compensation.<sup>16</sup>

With respect to recovery of the overpayment, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA.<sup>17</sup> As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to recovery of the overpayment under the Debt Collection Act.<sup>18</sup>

### **CONCLUSION**

The Board finds that appellant received a \$1,000.93 overpayment of wage-loss compensation for the period April 6 through 28, 2018, for which she was without fault. The Board further finds that OWCP properly denied waiver of recovery of the overpayment.

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<sup>14</sup> *Supra* note 11.

<sup>15</sup> *E.K.*, Docket No. 18-0587 (issued October 1, 2018).

<sup>16</sup> *See V.T.*, Docket No. 18-0628 (issued October 25, 2018).

<sup>17</sup> *E.F.*, Docket No. 18-1320 (issued March 13, 2019).

<sup>18</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 6, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 1, 2019  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board